Supreme Court, U.S.
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No. 07-398

IN THE

Supreme Court of the United States

JAMES ALFRED LACY,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

As this August Court stated in *Stogner v. California,* (2003) 539 U.S. 607 (*Stogner*), criminal statutes which violate the *Ex Post Facto* Clause will not stand. In this light the question is whether this court will allow exposing the jury to several *Stogner* charges, several of which were held unconstitutionally *Ex Post Facto* violations in the appeals process, which prejudiced the jury against the petitioner severely violating his right to a fair trial and biasing the jury against him by inundating them with *Stogner* counts, so as to deprive him due process of law as guaranteed by the Fifth and the Fourteenth Amendments, in addition to introducing evidence in direct violation of the notice requirement as set out in the rules.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, James Alfred Lacey,[1] respectfully prays that a Writ of Certiorari issue to review the decision issued by the Court of Appeal Court of the State of California, Second Appellate District, Division Four, and to review the denial of the Petition For Review by the California Supreme Court filed April 25, 2007 (Appendix page 29, *infra*).

OPINIONS BELOW

This Petition for Writ of Certiorari is brought to review the unpublished decision of the California Court of Appeal, Second Appellate District filed on January 22, 2007 (Appendix pages 1-28, *infra*), which affirmed petitioner's conviction as to count eleven of the information for violation of Penal Code § 288.5, subd. (a), and affirmed dismissal of count 12, violation of § 288, subd. (a) and concurred with the Attorney General that the prosecution for two counts of violation of § 288, subd. (a) were time-barred by the statute of limitations and not authorized by § 803, subd. (g), as the latter was held unconstitutional in violation of the *Ex Post Facto* Clause in *Stogner v. California*, 539 U.S. 607 (2003), requiring reversal in the instant case of the remaining counts six (6) and seven (7).

The opinion is reported as *People v. Lacy*, No. B162143 (2nd Dist. January 22, 2007) (unpublished), Los Angeles County Super. Ct. No. YA048697.

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[1] The parties are as they appear in the caption.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). The California Supreme Court denied review on April 25, 2007.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Fifth Amendment provision: 'that no person shall . . . be deprived of life, liberty or property without due process of law", is made applicable to the states through the Fourteenth Amendment. The Constitution's two *Ex Post Facto* Clauses prohibit the Federal Government and the States from enacting laws with certain retroactive effects. See U.S. Constitution, Art. I, § 9, cl. 3 (federal); and, Art. I, § 10, cl. 1 (states).

STATEMENT OF THE CASE

Petitioner James Lacy was arrested and charged, on July 17, 2001, with twelve counts of sexual misconduct, specifically, violating California laws against incest (with his daughter), approximately from 1968 to 1970; and child abuse (with his granddaughter), allegedly occurring within the last ten years. (Specifically, Penal Code §285, Incest; §288(a), Lewd Acts with Child under 14; and §288.5(a), Continuous Sexual Abuse of Child. Information YA 048697, filed September 28, 2001). *(Information, No. YA 048697.)*

The preliminary hearing was on September 13-14, 2001. Trial court dismissed eight of the counts (1 through 5, 8 through 10), on grounds of insufficient evidence, but convicted Petitioner on counts 6 and 7 (referring to incest), and 11 and 12 (referring to sexual

contact with an under-aged child and lewd acts with child under 14). Court convicted Petitioner on March 1, 2002, but dismissed Count 12.

Petitioner appealed the three remaining counts, 6, 7, and 11. Counts 1 through 10, Petitioner claimed, had been "time-barred" because their alleged occurrence was about 35 years ago; a California statute enacted since that time, Penal Code §803(g), allowed use of such counts in certain circumstances. Petitioner appealed to the California Appellate Court, Second District, on the grounds that counts 6 and 7 could not stand due to the ruling in *Stogner v. California* (2003), 539 U.S. 607; 123 S.Ct. 2446; 156 L.Ed.2d 544, by the U. S. Supreme Court, which invalidated CPC §803(g) as in violation of the *ex post facto* provisions in the U. S. Constitution (Article I, Section 9) and the Constitution of the State of California (Article I, Section 9). Petitioner further appealed Count 11, claiming that the conviction, by a jury, on that count, arose from the prejudicial nature of the other two remaining counts (6 & 7), in violation of an evidence rule cited in California Evidence Code §352.

The petitioner also appealed because of the improper "Mirandizing" he received, inasmuch as, at the time it was administered, his health and perception (sense of sight and hearing) were severely impaired.

The case was filed in Appellate Court, Second Appellate District, Division Four.

The Appellate Court, ruling on January 22, 2007, dismissed Counts 6 and 7 but allowed one remaining count, No. 11, to stand. Petitioner appealed to the California State Supreme Court, which declined *en banc* to hear the case, on April 22, 2007.

Count 11, however, derives from the same issue of evidence, involving the *Stogner* ruling, as the time-barred counts 6 and 7, and for this reason Count 11, the only count not dismissed by the courts in California, should be dismissed.

REASONS FOR GRANTING THE WRIT

This Court's jurisdiction is invoked, per Supreme Court Rule 14.1(e).

The Court's review is sought in this case because of issues arising under the U. S. Constitution (Article III, Section 2). The state appellate court has violated Petitioner's rights under Amendments 5 and 6 (concerning fair trial and due process of law), as well as under Article I, Section 9 of the U. S. Constitution (re *ex post facto* laws), and concerning rulings by the Supreme Court, namely, *Stogner v. California,* 539 U.S. 607 (a state statute permitting retroactive prosecution on sexual abuse charges is ruled unconstitutional) and *Miranda v. Arizona,* 384 U. S. 436 (suspects must be advised of their Constitutional rights at time of arrest). In sum, the ruling court, the California Appellate Court, violated Petitioner's rights to due process of law, and fair trial, and protection against *ex post facto* laws and self-incrimination.

We think that the venerable Court should review these constitutional issues, which were improperly applied by the state court, in order that the matter may be dismissed or, in the alternative, remanded for retrial.

The state courts properly reviewed the case and applied the *Stogner* ruling to the counts that were dismissed, but acted inconsistently with regard to Count 11, the only one not dismissed. It is proper that the

Supreme Court review this count, because of its constitutional issues, since the state courts have failed to do so.

The judgment by the California Appellate Court, Second District, affirmed in part and reversed in part, was entered on January 22, 2007. On April 27, 2007, the Supreme Court of California *en banc* denied a petition for hearing.

The jurisdiction of this Court is further invoked under 28 U.S.C. §1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree[.]"

SUMMARY OF ARGUMENT

Exposing the jury to several *Stogner* counts subsequently barred as *Ex Post Facto* violations prejudiced the jury against the Petitioner to a degree that is manifestly unjust and requires reversal. The Constitution prohibits states from enacting laws which have retroactive effects because they are "manifestly unjust and oppressive". See U.S. Constitution, Art. I, § 9, cl. 3; Art. I, § 10, cl. 1; *Calder v. Bull*, 3 Dall. 386, 391, 1 L.Ed. 648 (1798). Allowing a jury to hear all the information as to the barred counts simultaneous to the non *Stogner* count overwhelmed the jury making it impossible for them to have considered the final count independent of the unconstitutional counts, making it easy to assume guilt and effectively allowing the barred counts to stand.

Even with proper jury instructions, the overwhelming influence of the three *Stogner* counts to the one allows the unconstitutional retroactive effect to succeed. This is precisely one of the evils Justice Chase was concerned with preventing. *Calder v. Bull*, 3 Dall. 386, 391, 1 L.Ed. 648 (1798). While the prosecution has argued that they would have had this information as prior bad acts to consider, that is not necessarily the case because objections to some of the evidence may have been sustained under proper judicial consideration, as one of the witnesses was impeachable regarding memory due to a severe head injury, or it is also likely the information would not have come in at all under a California Evidence Code § 352 analysis regarding the probative value, an analysis which was never undertaken by the court. Nonetheless, the conviction as to count eleven should be reversed and at the very least petitioner should receive a new trial.

The notice requirement set out in the California Evidence Code § 1108(b) requiring all parties to give thirty days notice of any witness or evidence as to prior bad acts. The prosecution failed to adhere to this requirement as to the testimony of petitioner's daughter, thus it should not have been presented to the jury in that context. Additionally it should not have been presented to jury at all as it was singularly in reference to the barred *Stogner* counts.

At the present time, petitioner has no other remedy for the constitutional violations except through this court granting this petition, and remanding the case to the California Court of Appeal, Second District to consider the matter in light of *Stogner*.

CONCLUSION

For the reasons stated above this petition for writ of certiorari should be granted.

Dated: July 23, 2007.

Respectfully submitted,

LAW OFFICE OF NICOLAS J. ESTRADA

NICOLAS J. ESTRADA

Attorney for the Petitioner
JAMES ALFRED LACY

APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

Court of Appeal - Second Dist.
FILED
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Joseph A. Lane Clerk
Deputy Clerk

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ALFRED LACY,

Defendant and Appellant.

B162143

(Los Angeles County Super. Ct. No. YA048697)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed in part and reversed in part.

Nicolas J. Estrada for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant James Alfred Lacy appeals from the judgment entered after a jury convicted him of two counts of committing a lewd act upon a child and one count of continuous sexual abuse. (Pen. Code §§ 288, subd. (a); 288.5, subd. (a).[1] He contends: (1) the convictions for violating section 288, subdivision (a) should be reversed, as prosecution for those crimes is barred by the statute of limitations; (2) the trial court erred when it denied his section 995 motion; (3) his statement to police was taken in violation of his *Miranda* rights;[2] (4) his section 1118.1 motion should have been granted; (5) his tape-recorded statement should not have been played to the jury because much of the recording is inaudible; (6) the prosecutor misstated the evidence on the tape in her closing argument; (7) the court erred by giving CALJIC Nos. 2.50 and 2.50.1; (8) evidence admitted pursuant to Evidence Code section 1101, subdivision (b) should have been excluded; (9) he is entitled to a new trial; and (10) he should be granted bail on appeal. The Attorney General agrees that the statute of limitations bars prosecution for the two charges

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[1] All further undesignated statutory references are to Penal Code unless otherwise indicated.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

brought under section 288, subdivision (a). We concur with the parties and reverse those convictions. We otherwise affirm the judgment.

PROCEDURAL BACKGROUND

Defendant was originally charged in a 12-count complaint. It alleged that he committed lewd acts with two children under the age of 14, committed incest with one of the children, and engaged in continuous sexual abuse with a third child. (§§ 288; subd. (a); 285; 288.5, subd. (a).) Laura M., defendant's daughter, was the victim in counts 1 through 10, Lacy M., defendant's granddaughter, was the victim in count 11, and Marissa M., also defendant's granddaughter, was the victim in count 12. It was further alleged that although the statute of limitations had expired as to counts 1 through 10, prosecution was authorized by section 803, subdivision (g).

At the preliminary hearing, defendant argued there was insufficient evidence to bind him over for trial and counts 1 through 10 were barred by the statute of limitations. He was held to answer on all counts. After defendant's arraignment on the information, he filed a motion to set aside the information pursuant to section 995. The trial court granted the motion as to counts 1 through 5 and 8 through 10, finding the prosecution had failed to prove all of the elements required by section 803, subdivision (g). The motion was denied as to the other counts. The remaining counts alleged violations of section 288, subdivision (a) as to Laura M. (counts 6 and

7), section 288.5, subdivision (a) as to Lacy M. (count 11), and section 288, subdivision (a) as to Marissa M. (count 12).[3]

Prior to trial, defendant sought to exclude his statement to police, the tape recording of his statement to police, and evidence of uncharged prior sex acts he committed against Laura M. The trial court denied his motion in its entirety. After the prosecution presented its case-in-chief, defendant moved to dismiss all counts pursuant to section 1118.1. The motion was granted as to count 12 only. The jury convicted defendant of the charges in counts 6, 7 and 11.

The court sentenced defendant to 16 years in state prison for the violation of section 288.5, subdivision (a) and two consecutive terms prescribed by law for the two violations of section 288, subdivision (a).[4]

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[3] Defendant refers to counts 1 through 4 of the amended information; however, the trial court, in compliance with superior court rules, did not allow the counts to be renumbered. We will refer to the counts using their original designation in the complaint.

[4] As the two violations of section 288, subdivision (a) were committed before the July 1, 1977 effective date of the determinate sentencing law, the court ordered the Board of Prison Terms to calculate the sentences pursuant to section 1170.2.

STATEMENT OF FACTS

The Prosecution Case

Laura M. is defendant's daughter. As a child, she lived with defendant, her mother, and three brothers in a house in Carson. In approximately 1963, when she was about seven or eight, while on a sofa in the living room, defendant became aroused as she sat on his lap and began grinding or bumping against her with his genital area. Laura could feel his penis. This activity took place on other occasions. Defendant pretended it was a game.

When Laura was nine or 10, defendant began to take her to his bedroom. He touched her genitals and asked her to touch his. At first, they touched each other through clothing; later, it was on bare skin. As time went on, defendant began placing his fingers in her vagina and engaging in acts of mutual oral sex. By the time Laura turned 11, defendant was having sexual intercourse with her.

When Laura was about 14, she began to tell others about the sex acts. She told her counselor at school, people at church, and her mother. She remembered arguments between defendant and her mother. Following the arguments, the sex would cease for a month or so, but then continue. The acts of intercourse finally ended when Laura was 16 and decided to run away from home. Defendant came after her, and she told him the abuse had to stop. It did.

Due to severe medical problems, Laura moved back to her parents' home with her daughter Lacy in

June 2000. For a time, Laura and Lacy lived in a motor home on the property. Eventually, they moved into the house. Laura was concerned about having Lacy in the home with defendant, and she told Lacy not to go upstairs alone, as defendant's bedroom was there. Laura noticed that Lacy would sit on defendant's lap, but Lacy did not complain about his behavior and Laura did not witness any acts of sexual abuse. They moved out of the house in August 2001, after the charges in the instant case were filed against defendant.

Los Angeles County Sheriff's Deputy Douglas Blaydes was a detective and the investigating officer assigned to defendant's case.[5] He was a 29-year veteran of the department who had worked in the child abuse detail for the last 13 or 14 years. In July 2001, Laura told Detective Douglas Blaydes about the sex she had engaged in with defendant when she learned that Lacy had made similar allegations. Until then, Laura had not told any law enforcement officer about her sexual activity with defendant.

Lacy M. is defendant's granddaughter. She would sit on his lap while they were in the living room. When she was on his lap, defendant touched her 'private' outside her clothing. Lacy showed the jury where her 'private' was, pointing to an area between the legs of a female figure on a diagram. Lacy said defendant touched her only one or two times. She remembered speaking to Detective Blaydes, but could

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[5] He had retired from the department shortly before trial

not recall much of the conversation. Lacy said whenever she spoke to the police, she told the officers the truth.

On July 13, 2001, Detective Blaydes interviewed Lacy regarding possible sexual contact she may have had with the defendant. Detective Blaydes opined that it was far more difficult for a child to discuss sexual abuse by a family member as opposed to molestation by a stranger.

When Detective Blaydes spoke with Lacy, he used an anatomical drawing of a female to determine her knowledge of the various parts of the body. He pointed to different parts of the body in the drawing and asked her what she called each part. When he pointed to the vaginal area, Lacy said it was a "private." When the detective asked Lacy if anyone had touched her in a bad way, she replied that "Grandpa Jim" (defendant) touched her in a bad way by moving his fingers up and down over her vaginal area. She demonstrated by moving her fingers up and down on the vaginal area of the female in the drawing.

Lacy said the incidents occurred while she and defendant watched television. Defendant was on a recliner and while she sat on his lap, he rubbed Lacy between her legs. When Detective Blaydes asked her how many times defendant touched her in that manner, she answered seven. She told him the first occurrence was on her birthday the previous year, September 30, 2000. The last incident took place two or three weeks prior to the July 13 interview. Defendant told Lacy that the touching was their secret.

Detective Blaydes also interviewed defendant on July 13, which was the day defendant was arrested. He advised defendant of his *Miranda* rights. Defendant waived those rights, and agreed to speak to the detective. Before the detective began his questioning, defendant spontaneously said something to the effect of "it bothers me" or "it bothered me touching Lacy." When defendant was asked how he touched Lacy, he said all of the incidents took place in his home while they sat on the recliner. He placed his hand on Lacy's vagina, over her clothing, and rubbed her. Defendant said he last touched her about a week or two prior to the interview.

Defendant was asked how many times it happened, and he replied it was impossible to tell. He said touching Lacy became a habit. Detective Blaydes asked if was it true that the touching happened so many times that defendant could not put a number on it. Defendant answered yes, it happened all the time. Based on defendant's answers, the detective concluded the touching occurred three to five times a week between January 2001 and two weeks prior to defendant's arrest.

Detective Blaydes asked defendant if he had ever touched anyone else in the same way. Defendant admitted that he touched his daughter Laura when she was a child. Until defendant's admission, Detective Blaydes was unaware of any sexual activity between defendant and Laura. Defendant said he began having sexual intercourse with Laura when she was 13. He continued to do so once or twice a week for approximately one year. Defendant stopped having intercourse with his daughter after a minister from

church spoke to him about his conduct. Defendant denied having any other form of sexual conduct with Laura.

The detective asked defendant if he would agree to speak on tape. Defendant gave a second tape-recorded statement admitting to the sexual conduct. Detective Blaydes testified the tape had a lot of electronic interference caused by the microphone that was attached to defendant's lapel. Nonetheless, he could hear defendant's statements. The audiotape of defendant's statement was played in open court.

On July 16, 2001, the detective interviewed Laura. Her account of the sexual activity she had with defendant differed from defendant's.

Deputy John Despot was assigned to the Lennox Station in July 2001. He spoke to Lacy at her home on July 13. Lacy told him that defendant had rubbed her vaginal area on seven occasions.

Four-year-old Marissa M. testified that defendant tickled her on the stomach. She denied he touched her in any other way. (At the preliminary hearing, Sergeant Richard Erickson testified that Marissa told him that defendant touched her vaginal area on one occasion. Detective Blaydes testified that defendant admitted rubbing Marissa's vaginal area on one or two occasions.)

The Defense Case

Elizabeth Lacy, defendant's wife, testified that in April 1971 she had contact with a pastor from her church regarding possible sexual abuse of Laura by defendant.

She expected defendant's arrest based on the pastor's statement that he was going to call the police. However, defendant was not arrested. Shortly thereafter, she left on a three-month vacation with the children. She denied that Laura told her about defendant's acts of molestation.

DISCUSSION

The Statute of Limitations

Defendant argues the trial court erred when it applied section 803, subdivision (g) to allow his prosecution for the two counts of molesting Laura despite the fact that the statute of limitations had run. He was charged with committing acts in 1968 (count 6) and 1969 (count 7). He contends, and the Attorney General concedes, that *Stogner v. California* (2003) 539 U.S. 607 (*Stogner*) requires that the two convictions be reversed. We agree.

In *Stogner*, the United States Supreme Court held: "[A] law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution." (*Stogner, supra*, 539 U.S. at pp. 632-633.) Under former section 800, the statute of limitations ran on the charges alleged in counts 6 and 7 in 1971 and 1972, respectively. Thus, the relevant portions of section 803, subdivision (g), which became effective on January 1, 1994, cannot be used to resurrect charges long since time barred.

The Section 995 Motion

Defendant claims the trial court erred by denying his section 995 motion. He argues that the statute of limitations expired for counts 6 and 7 and there was insufficient evidence to hold him to answer on counts 11 and 12. He asserts the prosecution presented no evidence at the preliminary hearing connecting him to the crimes independent of his statements to the police. As we have concluded that counts 6 and 7 should have been dismissed, we proceed to counts 11 and 12.

It has long been the rule that "[a]n information will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it." (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474.) After reviewing the preliminary hearing transcript, we find there is ample support for the trial court's ruling as to counts 11 and 12.

The prosecution chose to present its case through the hearsay statements of deputy sheriffs who spoke to the victims about the offenses defendant had committed. It also called Detective Blaydes, who testified to defendant's confession. Contrary to defendant's claim, the testimony established defendant touched Lacy's vaginal area on seven occasions (count 11) and Marissa's vaginal area once (count 12). Detective Blaydes testified defendant admitted to touching the girls' vaginal area by rubbing them between their legs.

Defendant points to the testimony of his wife. She testified that Lacy denied defendant touched her the

first four times she was asked. Therefore, he argues, the prosecution failed to present sufficient evidence of a corpus to allow the introduction of his statement. He ignores the fact that his wife admitted that Lacy eventually told a deputy sheriff that defendant had touched her. At best, his wife's testimony contradicted one deputy who testified that Lacy did not deny being touched by defendant. The trial court property denied defendant's motion to dismiss counts 11 and 12.

The Alleged *Miranda* Violation

Defendant argues that his statement to Detective Blaydes should have been suppressed, as it was taken in violation of his *Miranda* rights. Defendant claims his vision, hearing, and perception were so impaired at the time of the interview that his waiver of his rights was neither knowing nor intelligent.

In order to use an accused's statement at trial, the prosecution must prove by a preponderance of the evidence that the accused's waiver of his or her *Miranda* rights was knowing, intelligent, and voluntary. (*People v. Markham* (1989) 49 Cal.3d 63, 71.) We examine the evidence presented in the trial court.

Detective Blaydes testified at the hearing on defendant's motion to suppress that he advised defendant of his *Miranda* rights both orally and in writing. Defendant initialed and signed a form stating that he was advised of his rights and voluntarily waived them. The detective said defendant did not complain at any time that he could not see the form, hear the detective, or understand his rights. When Detective

Blaydes advised defendant of his constitutional rights on tape prior to recording defendant's statement, defendant again said he understood his rights and agreed to waive them.

In response, defendant offered the testimony of his wife. She stated that on the day of his arrest and interview, July 13, defendant took medication for arthritis and high blood pressure that caused him to become drowsy and dizzy. He also wore glasses, however, he did not have them when he was arrested. She also testified that defendant was hard of hearing, but too proud to wear a hearing aid.

Initially, we note there was no evidence that *at the time of his interview*, defendant was suffering from any physical or mental ailment that rendered his waiver involuntary. Moreover, any shortcoming in either regard standing alone does not warrant suppressing his statement to Detective Blaydes. "The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental *coercion*." (*Colorado v. Connelly* (1986) 479 U.S. 157, 170; *People v. Kelly* (1990) 51 Cal.3d 931, 951 ["[D]efendant's low intelligence and psychiatric symptoms, standing alone, do not render his waiver of *Miranda* rights involuntary."].) The case cited by defendant involves an allegation that police misconduct resulted in an involuntary waiver. In *U.S. v. San Juan-Cruz* (9th Cir. 2002) 314 F.3d 384, the defendant claimed the officer's recitation of the *Miranda* rights caused confusion that invalidated his waiver. The police are not charged with any misconduct in our case.

Moreover, at the end of the taped statement, defendant is asked whether the officer made any promises in order to get defendant to speak. Defendant answers, "No." Defendant agrees that his statement was given freely and voluntarily. We conclude the trial court correctly ruled that defendant voluntarily waived his *Miranda* rights before speaking with Detective Blaydes.

The Trial Court's Ruling on Defendant's Dismissal Motion

Defendant argues the trial court erred when it denied his dismissal motion made pursuant to section 1118.1 as to count 11. He asserts there was insufficient evidence to establish that he engaged in "substantial sexual conduct" and committed three separate lewd or lascivious acts, as required by section 288.5, subdivision (a).

> "The test applied by the trial court in ruling on a motion for acquittal is the same test applied by the appellate court in reviewing a conviction for sufficiency of the evidence, namely, to determine whether from the evidence then in the record, including reasonable inferences to be drawn therefrom, there is substantial evidence of the existence of every element of the offense charged. [Citations.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 89.)

Defendant's claim that the prosecution failed to prove he engaged in "substantial sexual conduct," as that

term is defined in section 1203.066, subdivision (b), suffers from a basic misunderstanding of the requirements of section 288.5, subdivision (a). One violates the statute if he or she "engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, *or* three or more acts of lewd or lascivious conduct under Section 288, with a child under the age of 14 years at the time of the commission of the offense . . . ." (§ 288.5, subd. (a), italics added.) The prosecution relied on the second prong of the statute. Thus, we turn to whether the evidence presented was sufficient to prove defendant committed three or more lewd acts with Lacy.[6]

Defendant correctly points out that Lacy testified he touched her only one or two times. He argues since the jury should not have heard his tainted confession or the testimony of the deputies who said Lacy told them defendant had touched her vaginal area seven times, his motion should have been granted. He is incorrect. First, we have concluded defendant's confession was properly admitted. Second, defendant fails to explain why the deputies' testimony regarding Lacy's prior inconsistent statements should have been excluded.

Defendant asserts that "Lacy's testimony that her grandfather touched her only once or twice was

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[6] Section 288.5, subdivision (a) also requires that the offender either reside in the same home with the victim or have recurring access to the victim and commit the acts over a period of time, not less than three months in duration. Defendant does not challenge the evidence as to those elements of the statute.

reasonable, credible, and of a solid nature." However, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The only conflict in the evidence goes to the number of occasions defendant touched Lacy. Notwithstanding Lacy's failure to testify to the requisite number of acts, the addition of her prior inconsistent statements and defendant's confession that touching Lacy became a habit that took place on far more than three occasions clearly justify the trial court's denial of defendant's section 1118.1 motion.

The Admission of the Audiotape of Defendant's Confession

Defendant claims his audiotaped statement should have been excluded. He asserts the "recording is inaudible at some parts and much of the content is obliterated by static." He concludes: "Therefore the jury could not hear the whole statement. It is possible that [defendant] took back parts of his confession during the inaudible parts."

Detective Blaydes testified he used a new audiotape to record defendant's statement. He acknowledged there was a lot of static on the recording, surmising it was caused by defendant's lapel, where the microphone was attached. "To be admissible, tape recordings need not be completely intelligible for the entire conversation as long as enough is intelligible to be

relevant without creating an inference of speculation or unfairness." *People v. Demery* (1980) 104 Cal.App.3d 548, 559.) We have listened to the tape. Although some small segments of the conversation are inaudible, the vast majority of the interview can be understood.

Finally, we reject defendant's claim that the jury might have missed certain exculpatory evidence, as being wholly unsupported by the record. The argument presupposes the tape included such evidence and defendant gives us no reason to believe that his taped statement included anything other than his confession.

Alleged Prosecutorial Misconduct

Defendant claims the prosecutor "made a significant misrepresentation" of his statement to Detective Blaydes. He argues that when the detective asked him if he touched Lacy so many times that he could not put a number on it, he replied "probably." He asserts the prosecutor told the jury his answer to Detective Blaydes question was "yes."

Initially, we note defendant did not object to the prosecutor's argument at the time of trial. "To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 447.) Given the alleged minor discrepancy defendant raises, a timely objection and admonition would have cured any possible prejudice. Defendant has forfeited his claim.

More to the point, the prosecutor did not misstate the evidence. Defendant claims misconduct and directs us to a certain portion of the argument. At the cited page, the prosecutor argued that defendant "told the detective that those incidents were so numerous that he could not estimate how many times because he had touched Lacy so much, defendant said, it became a habit." We have reviewed the testimony pertaining to defendant's statement and find the prosecutor's summary accurate.

CALJIC Nos. 2.50 and 2.50.1

As the prosecution presented evidence of uncharged sexual acts committed by defendant upon his daughter Laura, the court gave the jury CALJIC Nos. 2.50 and 2.50.1.[7] Defendant claims the trial court erred.

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[7] The jury was read CALJIC No. 2.50 as follows:

"Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial.

"Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:

"The existence of the intent which is a necessary element of the crimes charged;

"A motive for the commission of the crimes charged;

"The crimes charged are a part of a larger continuing plan, scheme or conspiracy;

It is difficult to grasp the gist of defendant's argument. Initially, he argues the jury should not have heard testimony relating to his prior acts, contending that the evidence was used for the improper purpose of showing his disposition to commit crimes. He then asserts that since the evidence of prior acts was weak, the court should not have given the two instructions. Finally, he claims the instructions are confusing and misleading. He argues the jury could not have properly understood the limited nature for which prior act testimony is allowed.

On the issue whether the trial court should have allowed evidence of uncharged acts, defendant merely offers the conclusion that Laura's testimony was inadmissible and prejudicial. Defendant argues the jury was exposed to "such a substantial amount of inadmissible evidence that it amounted to reversible

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"For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

"You are not permitted to consider such evidence for any other purpose."

The jury was read CALJIC No. 2.50.1 as follows:

"Within the meaning of the preceding instructions, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed crimes other than those for which he is on trial.

"You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the other crimes."

error," and concludes Laura's testimony was improperly used to prove he had a disposition to commit lewd acts. He does not explain why the evidence is not *relevant* to prove intent or to show a common plan or scheme, and thus admissible pursuant to Evidence Code section 1101, subdivision (b).[8] He fails to present a citation to the record, argument, or authority to support his claim. An issue raised in such a perfunctory manner requires no further discussion. (*Golden Day Schools, Inc. v. Department of Education* (1999) 69 Cal.App.4th 681, 695, fn. 9.)

Defendant attacks the strength of the evidence presented to prove the prior acts and raises two arguments. He claims the admission of the evidence allowed the prosecution to convict him without proving every element of the crime beyond a reasonable doubt, arguing the jury must have relied on what he labels "propensity evidence." He offers no support in the record for this assertion. He argues CALJIC No. 2.50 should not have been given, relying on *Carella v. California* (1989) 491 U.S. 263 (*Carella*). The case is inapposite. The *Carella* court held that statutory presumptions in section 484, subdivision (b) and Vehicle Code section 10855 improperly lessened the prosecution's burden of proof. No such presumption is involved in our case. Next, while defendant acknowledges that uncharged crimes may be proved by a preponderance of the evidence, he asserts the court should not have allowed Laura's testimony because it failed to meet that

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[8] His argument that the testimony should have been excluded pursuant to Evidence Code section 352 will be discussed below.

burden. Defendant provides no authority for his position that the trial court must determine whether evidence is truthful prior to deeming it admissible. To the contrary, the court is obliged to admit all relevant evidence at trial, unless excluded under the United States or California Constitution or by statute. (Evid. Code § 351; *People v. Heard* (2003) 31 Cal.4th 946, 973.) It is the jury that determines whether the proffered evidence meets the required burden of proof.

As the court allowed Laura to testify about prior uncharged acts, it was obliged to give the jury some guidance as to how to utilize the evidence. Defendant's claim that the strength or weakness of such evidence was relevant to the issue whether an instruction should have been given is off the mark. The only relevant question is: Did CALJIC Nos. 2.50 and 2.50.1 mislead the jury?

Defendant argues "[i]t has been held that these specific instructions are not easily understood by jurors, that common jurors are likely incapable of assigning the appropriate weight to the evidence or of using it solely for its admissible purposes." He claims that in *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*), our Supreme Court "specifically stated that instruction 2.50.1 was insufficient to delineate clearly for the jury the different standards of proof applicable to 'a preponderance of the evidence' and to 'beyond a reasonable doubt.'" He is incorrect.

The *Reliford* court examined CALJIC No. 2.50.01, not 2.50.1. (*Reliford, supra*, 29 Cal.4th at p. 1012.) That instruction refers to evidence of other sexual offenses and informs the jury that it may use such

evidence, if found to be true, to infer that a defendant has a disposition to commit sexual offenses. Defendant's jury was not given this instruction. Moreover, contrary to defendant's contention, the *Reliford* court rejected Reliford's claim that CALJIC No. 2.50.01 misled the jury. (*Ibid.*) Defendant also cites *People v. James* (2000) 81 Cal.App.4th 1343 (*James*), and argues the case supports his view that the jury was confused by the court's instructions. The *James* court discussed CALJIC No. 2.50.02. That instruction relates to prior acts of domestic violence admitted pursuant to Evidence Code section 1109. (*Id.* at pp. 1349-1350.) This instruction was not given in defendant's trial. Finally, defendant cites *People v. Sizemore* (formerly reported at 99 Cal.App.4th 546) and argues it was error to instruct the jury with CALJIC No. 2.50.1. We note that the Supreme Court granted hearing in *Sizemore* and the case is no longer citable authority. (*People v. Sizemore*, review granted Sept. 18, 2002, S108717.)

As to defendant's argument that CALJIC Nos. 2.50 and 2.50.1 fail to provide proper guidance to the jury, the instructions are a correct statement of the law. (*People v. Wilson* (2005) 36 Cal.4th 309, 327-328.) The trial court did not err by giving the two instructions to the jury.

Evidence Code Section 352

Defendant claims the trial court failed to perform the appropriate balancing test required by Evidence Code section 352 when it admitted Laura's testimony of prior uncharged acts pursuant to Evidence Code section 1108. Initially, we point out that the trial court granted

the prosecution's motion to admit the evidence pursuant to Evidence Code section 1101, subdivision (b), not 1108. The court denied admission pursuant to Evidence Code section 1108, ruling the prosecution failed to comply with the notice requirement set forth in subdivision (b) of that section. We take issue with defendant's claim that the trial court undertook no evaluation of the relevant factors under Evidence Code section 352. The reporter's transcript reveals that extensive argument took place on the issue. We examine whether the court properly exercised its discretion in admitting Laura's testimony.

> "Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Applying this standard, we find no abuse of discretion. The proffered evidence revealed that defendant engaged in the same sex acts with the mother

of the alleged victim in court 11. Laura testified defendant began touching her when she was seven years old, the same age as Lacy when defendant began molesting her. The acts took place while the children sat on defendant's lap when on either a sofa or recliner in the living room. The method of molestation was identical. With all of the children, Laura, Lacy, and Marissa, defendant rubbed their vaginal area on the outside of their clothing. This evidence was admissible to establish that defendant carried out his molestations pursuant to a common plan or scheme. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

On the other side of the balance, the trial court recognized that 30 years had passed between the acts on Laura and Lacy. However, it ruled the mere lapse of time was outweighed by the facts that the molestations occurred within the same family and started in the same way. Defendant argues the passage of time, in and of itself, requires exclusion of Laura's testimony. No so. Given that the two victims are mother and daughter and defendant is their father and grandfather, respectively, it stands to reason that a substantial period of time passed between the offenses. The trial court weighed the factors appropriately and its admission of evidence of defendant's prior acts with Laura was not an abuse of discretion.

The Alleged Discovery Violation

As noted, the court precluded the prosecution from admitting Laura's testimony concerning the prior acts of defendant pursuant to Evidence Code section 1108 on the ground that it failed to provide the notice

required by subdivision (b) of that section. That subdivision mandates that the prosecution "disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7." Section 1054.7 requires that disclosures "shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred." Defendant argues the same requirement must be grafted onto the prosecution's request to seek admission of evidence pursuant to Evidence Code section 1101, subdivision (b).

We need not decide this issue for the simple reason that section 1054.1 requires the prosecution to provide the defense with the names and addresses of witnesses the prosecution intends to call at trial and all written or recorded statements of those witnesses. The information must be disclosed to the defense within the guidelines set forth in section 1054.7.

Defendant's argument that he was not provided adequate notice of Laura's testimony is puzzling, to say the least. The prosecution used the same testimony during the trial that it had presented at the preliminary hearing. The evidence was used to support the charges filed in the original complaint which were dismissed pursuant to defendant's section 995 motion. Defendant's attorney conceded that he was given the reports detailing Laura's statements before the preliminary hearing. We fail to see how defendant was surprised by Laura's proffered testimony when he was

provided with police reports, charged with the same conduct in the complaint, and given the opportunity to cross-examine the detective who testified to Laura's statements at the preliminary hearing.

Defendant's Motion for New Trial

Defendant argues the matter should be remanded for a new trial on count 11. The Attorney General argues defendant forfeited his claim of error by failing to move for a new trial in the trial court. Defendant responds he had no way of knowing that counts 6 and 7 would eventually dismissed as time barred, and argues the fact that the jury improperly heard evidence underlying the dismissed counts unduly prejudiced his right to a fair trial.

Without deciding whether defendant forfeited his right to request a new trial, we note that even if counts 6 and 7 had been dismissed prior to trial, the jury would have heard evidence of his prior uncharged acts with Laura. We have determined that the trial court properly allowed the prosecution to present Laura's testimony relating to counts the court had already dismissed, as the evidence was admissible under Evidence Code section 1101, subdivision (b).

In any event, after a review of the entire record, we conclude that assuming it was error to admit Laura's testimony with regard to the allegations in counts 6 and 7, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) The prosecution's case as to count 11 was extremely strong. It presented evidence from Lacy, Laura's testimony with

respect to other uncharged sex acts, and defendant's two confessions, one of which was audiotaped. We conclude defendant's right to a fair trial was not violated, and a new trial is not warranted.

Bail on Appeal

Defendant asks that we grant him bail on appeal. At the time he filed his appeal, he had not requested bail in the trial court. Release on bail after a felony conviction is within the discretion of the trial court. (*In re Pipinos* (1982) 33 Cal.3d 189, 196.) Although defendant made a belated request for bail in the trial court on July 27, 2006, the trial court's ruling denying bail is not a subject of this appeal.

Moreover, in order to be granted release on bail pending appeal a defendant must demonstrate, inter alia, that the appeal "raises a substantial legal question which, if decided in favor of the defendant, is likely to result in reversal." (§ 1272.1, subd. (c).) Given our affirmance of defendant's conviction, it is less likely his appeal will ultimately result in reversal.

DISPOSITION

The convictions on counts 6 and 7 are reversed. The judgment is affirmed in all other respects. The trial court is to prepare an amended abstract of judgment and forward a corrected copy to the Department of Corrections.

NOT TO BE PUBLISHED IN THE OFFICIAL RECORDS

SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.

Court of Appeal, Second Appellate District
Division Four, No. B162143
S150679

IN THE SUPREME COURT OF CALIFORNIA
En Banc

THE PEOPLE,
Plaintiff and Respondent,
v.
JAMES ALFRED LACY,
Defendant and Appellant.

SUPREME COURT
FILED
APR 25 2007
Frederick K. Ohlrich Clerk

Deputy

The petition for review is denied.

GEORGE
Chief Justice